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**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

KIM SMITH,

Plaintiff,

v.

JAMES MORGAN, et al.,

Defendants.

Civil No. 1:01-CV-0817

(Judge William W. Caldwell)

(M.J. Malachy E. Mannion) ✓

**CORRECTIONS DEFENDANTS' MOTION FOR AN
ENLARGEMENT OF TIME TO FILE THE BRIEF
IN OPPOSITION TO PLAINTIFF'S MOTIONS
FOR TEMPORARY RESTRAINING ORDER'S**

The Corrections Defendants, by and through their attorney, John J. Talaber, Assistant Counsel, Pennsylvania Department of Corrections, respectfully request this Honorable Court to grant them an enlargement of time until January 31, 2002 to file the brief in opposition to Plaintiff's Motions for Temporary Restraining Orders (docs. 5, 18). The following averments are made in support of the Motion:

Parties and Nature of Action:

1. Plaintiff Kim Smith is an inmate currently incarcerated at the State Correctional Institution at Coal Township ("SCI-Coal Township"). See Amended Complaint (doc. 20), p. 12.
2. The Department of Corrections Defendants ("Corrections Defendants") include: (1) Kathy Allen; (2) Nancy Ambrose; (3) Mary Bernas; (4) Sharon Burks; (5) Kandis Dascani; (6) John Dunn; (7) Harry Ersek; (8) Frank Gillis; (9) Robert Glenney; (10) Robert Gooler; (11) Dr. Robyn Johns; (12) Roy Johnson; (13) Tim Jordan; (14) Bernon Lane; (15) John Learn; (16) Edward Mason; (17) Miller; (18) James Morgan; (19) Wilma Sewell; (20) Raymond Smith; (21) David Varano; (22) Voeckler; (23) George Weaver; (24) Lynn Wolfgang; (25) Gerald Whysong; (26) Pat Yarger; (27) Angela Zimmerman; and (28) Hazel Zimmerman. See Amended Complaint, pp. 1-16.
3. Smith also names as Defendants Wexford Health Services, Inc. and Dr. Ronald Long, who are represented by James D. Young, Esquire. See Entry of Appearance (doc. 28).

4. In this 42 U.S.C. §1983 action, Smith alleges that the Corrections Defendants violated his First, Eighth, and Fourteenth Amendment rights under the United States Constitution. See Amended Complaint, pp. 1-16.
5. Smith is suing the Corrections Defendants in their individual capacities. See Amended Complaint, p.8.
6. Smith seeks injunctive relief, as well as, compensatory and punitive damages. See Amended Complaint, pp. 1-16.

Relevant Procedural History:

7. Smith initiated this action with the filing of a Complaint and an Application for In Forma Pauperis status on May 10, 2001. See Complaint (doc. 1); Application to proceed IFP (doc. 2).
8. The Court, by Order dated June 6, 2001, directed Smith to file an Amended Complaint on or before July 6, 2001. See Order (doc. 8).
9. On July 11, 2001, Smith filed an Amended Complaint. See Amended Complaint (doc. 20).
10. On August 3, 2001, the Court found that Smith's Amended Complaint substantially complied with its previous orders, and directed the Clerk of Court to serve process on the Defendants. See Order (doc. 24).

11. Additionally, by that same Order, the Court ordered service upon the Defendants of Smith's two Motions for Temporary Restraining Orders ("TROs")(docs. 5, 18).
12. On or about September 26, 2001, the undersigned attorney waived service of summons for the Corrections Defendants.
13. On November 6, 2001, the Corrections Defendants waived their right to reply to Smith's Amended Complaint pursuant to 42 U.S.C. §1997(e). See Waiver of Reply (doc. 33).
14. That same day, the Corrections Defendants filed a motion and supporting brief for leave to depose Smith, as well as, Interrogatories and a Request for Production of Documents. See Motion and Brief (docs. 35, 36); see also Supporting Documents to the Corrections Defendants' Brief in Opposition to Smith's Objections (doc. 43), Exhibits A and B.
15. On November 7, 2001, Smith filed a "motion for injunction to stop the abuse and put a freeze on the defendants assets with attachments."See Motion (doc. 34). To date, the Corrections Defendants have neither been served with a copy of this "Motion" nor have they been served with a copy of the supporting brief or affidavits as required by Fed.R.Civ.P. 5, Pa.MDLR 7.2.

Pa.MDLR 7.3, and the Court's Standing Practice Order (doc 7), that applies to *pro se* indigent prisoner Plaintiffs, such as Mr. Smith, absent express revocation in a specific case by the Court through Pa.MDLR 1.2.

16. The Court, by Order dated November 8, 2001, granted the Corrections Defendants leave to depose Smith. See Order (doc. 37).
17. On November 19, 2001, the Corrections Defendants were served with a document titled "Motion for Enlargement of Time *Nunc Pro Tunc*" and on November 14, 2001, were served with a document titled "Objection to Interrogatories *Nunc Pro Tunc*." See Supporting Documents to the Corrections Defendants' Brief in Opposition to Smith's Objections (doc. 43), Exhibits C and D. In reviewing the Court docket, there is no indication that Plaintiff filed the documents with the Clerk of Courts. However, in recognition of Smith's *pro se* status, the Corrections Defendants filed a brief in opposition to his "objections" on December 5, 2001. See Brief and Supporting Documents, (docs. 42,43). A decision on Plaintiff's objections and the Corrections Defendants' response is pending.
18. On November 30, 2001, Smith filed a "Motion for Temporary Restraining Order *Nunc Pro Tunc*" (doc. 39). The Court, by Order dated December 6,

2001, directed Smith to serve his November 30, 2001 Motion for a TRO (doc. 39) upon all defendants, to file with the Court a certificate of service, and directed the Defendants to respond to Plaintiff's TRO within fifteen (15) days of service of the Motion. See Order (doc. 41). To date, the Corrections Defendants have neither been served with a copy of this "Motion" nor have they been served with a copy of the supporting brief or affidavits as required by Fed.R.Civ.P. 5, Pa.MDLR 7.2. Pa.MDLR 7.3, and the Court's Standing Practice Order (doc 7), that applies to *pro se* indigent prisoner Plaintiffs, such as Mr. Smith, absent express revocation in a specific case by the Court through Pa.MDLR 1.2.

19. The Court docket indicates that on December 17, 2001, Smith filed a motion to extend time by ninety (90) days, as well as, objections to Interrogatories *nunc pro tunc*. To date, the Corrections Defendants have not been served with a copy of this "Motion;" however, it is possible, given the holidays and the United States Mail system, that the documents may be delayed if they were served on the Corrections Defendants.
20. Finally, and for purposes of this Motion, the Court, by Order dated December 6, 2001, directed the Defendants to file a response to Plaintiff's

Motions for TROs (docs. 5, 18) on or before December 30, 2001;

accordingly, a response is now due. See Order (doc. 40).

Motion for Enlargement of Time:

21. The Corrections Defendants, by and through their undersigned attorney, respectfully request an enlargement of time until January 20, 2001 to file their response to Plaintiff's Motions for Temporary Restraining Orders.
22. Federal Rule of Civil Procedure 6(b) provides, in part, that "[w]hen by these rules . . . an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . order the period enlarged if request therefore is made before the expiration of the period originally prescribed"
23. The Corrections Defendants request an enlargement of time for multiple reasons.
24. First, in reviewing Mr. Smith's Motion for a TRO filed on May 10, 2001 (doc. 5), the Motion for a TRO filed on July 11, 2001 (doc. 18), it appears that the same averments and arguments are contained in the Amended Complaint also filed on July 11, 2001 (doc. 20). Mr. Smith is seeking an extraordinary remedy from this Honorable Court, yet both Motions for the

TROs fail to present prima facie evidence of: (1) a reasonable probability of eventual success on the merits of the case; (2) a showing that Mr. Smith will be irreparably harmed by denying his Motions; (3) a showing of no adverse impact upon other parties interested in the proceedings; and (4) a showing that injunctive relief would serve the public interest. See Alessi v. Pa. Department of Public Welfare, 893 F.2d 1444 (3d Cir. 1990).

25. Here, Mr. Smith seeks an affirmative order of this Court to direct the Department of Corrections, at their expense, to take him to outside medical specialists to determine if he is being deprived of health care, and then to have the results presented to the Court for review. Further, Mr. Smith seeks an affirmative order of this Court to stop alleged retaliation by the Defendants at SCI-Coal Township. Together, the relief sought is the same, absent damages, that Mr. Smith is requesting from his Amended Complaint.
26. Even based on the facts as alleged in Mr. Smith's numerous court filings presented to this Honorable Court, it is clear that he is receiving medical treatment for his various conditions from numerous physicians, and that this dispute is really a difference of opinion as to the appropriateness of the

treatment given, rather than any deliberate indifference by the Corrections Defendants.

27. Further, Mr. Smith's Motions are critically defective in prima facie evidence showing that there will be no adverse impact on the Corrections Defendants (and the Department of Corrections as an other party interested in the proceedings) by granting the relief he requests. In fact Mr. Smith seeks to have the Department of Corrections, and the taxpayers of the Commonwealth, pay for the expenses associated with the medical examinations, without substantial justification that the relief is necessary to serve the public interest of an inmate already receiving treatment from multiple licensed physicians.
28. Regarding his alleged retaliation, Mr. Smith fails to set forth the necessary elements beyond mere conclusion and speculation, as required by Rausser v. Horn, 241 F.3d 330, 333 (3d. Cir. 2001)(setting forth the elements required for a prisoner's cause of action for retaliation and the burden of proof he must carry to succeed.)
29. Accordingly, because Mr. Smith fails to meet his burdens for the extraordinary remedy of a TRO for immediate relief, and the arguments in

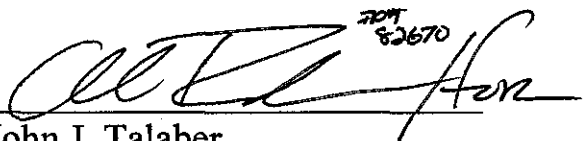
the Motions are also before the Court as the underlying claims in the Amended Complaint, the Corrections Defendants request an enlargement of time (should a response beyond the above mentioned paragraphs be necessary), so that discovery may be conducted and the appropriate dispositive motions filed.

30. Second, as noted in the lengthy procedural history above, the Corrections Defendants have tried to obtain the cooperation of Mr. Smith in discovery. Given his *pro se* status and the poorly drafted Amended Complaint, the Corrections Defendants seek additional information from Mr. Smith, as stated in their Brief in Opposition to his Objections (doc. 43). The Corrections Defendants, in cooperation with the Department of Corrections, have provided Mr. Smith with the means and ability to respond to their discovery requests that will help shape the scope of this action. Accordingly, the Corrections Defendants respectfully request an enlargement of time until January 31, 2002, to respond to the Motions for TROs so that they can receive the outstanding discovery responses and utilize the information therein in framing their response to the TROs.

31. Third, the Corrections Defendants seek an enlargement of time so that their undersigned attorney may coordinate with the Wexford Defendants' counsel a mutually convenient time (after service of the outstanding discovery requests) to depose Mr. Smith through videoconference technology. The Corrections Defendants submit that the deposition will assist the parties and the Court in resolving this dispute.
32. Finally, the Corrections Defendants seek an enlargement of time to respond so that their attorney can consult his clients, and obtain documents and declarations to support their Brief in Opposition to Plaintiff's Motion for TROs.
33. Mr. Young, counsel for the Wexford Defendants, et al., concurs with the Corrections Defendants request for an enlargement of time.

WHEREFORE, for the reasons set forth above, the Corrections Defendants' respectfully request the Court to grant them an enlargement of time until January 31, 2002 to respond to Mr. Smith's Motions for Temporary Restraining Orders (docs. 5 and 18).

Respectfully submitted,


John J. Talaber
Assistant Counsel
Attorney Id. No. 83279

PA Department of Corrections
55 Utley Drive
Camp Hill, PA 17011
(717) 731-0444

Dated: December 20, 2001

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KIM SMITH,

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: (Judge William W. Caldwell)
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: (Magistrate Judge Malachy E. Mannion)
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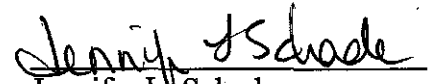
CERTIFICATE OF SERVICE

I undersigned hereby certifies that a copy of the Corrections Defendants' Motion for an Enlargement of Time to File the Brief in Opposition to Plaintiff's Motions for Temporary Restraining Orders in this matter was served upon the person(s) in the manner indicated below.

Service by first-class mail
addressed as follows:

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Coal Township, PA 17866-1020

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Harrisburg, PA 17108-1245


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Clerk Typist II

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Dated: December 20, 2001